

Lawrence Douglas

## EYES SCRATCHED IN

Reflections on *The Bramble Bush*  
by Karl Llewellyn (1930)

Karl Llewellyn, *The Bramble Bush. Some Lectures on Law and Its Study*, New York: Columbia University 1930; *The Bramble Bush. The Classic Lectures on the Law and Law School*, 11th printing, with a new introduction and notes by Steve Sheppard, New York: Oxford UP 2008. All the quotations cited in the following text are taken from the latter edition.

It is said that William Brennan, the great US Supreme Court Justice, liked to greet his incoming law clerks with a bracingly simple definition of constitutional doctrine: five votes. ›You can't do anything around here‹, Brennan would say, wiggling the fingers of his hand, ›without five votes.‹<sup>1</sup> While memorable, Brennan's definition was not entirely original. Seventy-five years before Brennan's elevation to the high court, the jurist Oliver Wendell Holmes Jr. famously wrote: ›The life of the law has not been logic; it has been experience [...]. The law [...] cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.‹<sup>2</sup> Some years later, Holmes returned to this idea, writing: ›The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.‹<sup>3</sup> Statements such as Brennan's and Holmes' found elaboration in the American jurisprudential movement known as ›legal realism‹. One of its most influential and articulate exponents was the law professor Karl Llewellyn (1893–1962). Trained at Yale Law School, and on the faculty of Columbia, Llewellyn had a foot in the two institutions most prominently associated with the realist movement.

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- 1 Stephen Wermiel, William Joseph Brennan, Jr., in: Melvin Urofsky (ed.), *The Supreme Court Justices. A Biographical Dictionary*, London 2015, p. 53.
  - 2 Oliver Wendell Holmes, *The Common Law*, Boston 1881, p. 1.
  - 3 Idem, The Path of the Law, in: *Harvard Law Review* 10 (1897), pp. 457-478, here p. 461.

The details of Llewellyn's personal biography can be passed over quickly, except to note that the Seattle-born and Brooklyn-raised Llewellyn fought in World War I – on the side of the Germans. A student at the Sorbonne at the time hostilities broke out, Llewellyn, who had previously spent three years at a Gymnasium in Mecklenburg, sympathized with the German cause and joined the Prussian infantry. He saw action at the first battle of the Ypres, for which he earned the Iron Cross, apparently the only American ever to receive this dubious distinction.<sup>4</sup> After returning to the States and completing his education at Yale, Llewellyn took a teaching post at Columbia. There, in 1929, he delivered a series of lectures to the first-year law students. Collected and published (first at Llewellyn's own expense, later commercially) as *The Bramble Bush*, the volume became immensely popular and all but obligatory reading for a generation of law students and practitioners alike.

If a classic can be defined as a book that people feel they should read but don't, *The Bramble Bush* now fits the bill. Back when I studied law at Yale in the late 1980s, I had heard of Llewellyn and his famous lectures, but it was not until nearly thirty years after my graduation that I actually got around to reading them. Admittedly, encountering *The Bramble Bush* for the first time as a mature legal scholar does not offer the best position from which to measure the merits of the book. The lectures are intended for students at the beginning of their legal studies. Their tone is colloquial and intimate; the reader occupies the position of one eavesdropping on Llewellyn's class. The professor addresses his students in the second person; and the ›you‹ to whom he speaks is, given the time and place of the lectures' composition, assumed to be white, male, and genteel in his privilege. Left unedited are even those jokes and puns that must have caused some wincing in Columbia's august lecture hall (›a case [...] is made up for lawyers not of a dozen bottles‹, p. 20). Yet the book also benefits from its format. The writing is attractively direct and lively – sharp, even; filled with lapidary turns of phrase: ›Judges do not cease to be human because they wield a gavel.‹ (p. 31)

This latter quality is hardly surprising, as the realists were all about hard-boiled clarity. The movement sought to cut through the obfuscations associated with legal formalism, the prevailing school of jurisprudence at the time. Formalism viewed law as a system of positivized rules, general in their scope, neutral in their application, and formal in their content – that is, bearing no necessary connection to the strictures and tenets of morality. Because law was defined by its formal properties, a contract that failed, for example, to follow proper form was considered void, even if the instrument appeared to represent a full meeting of the minds of the contracting parties.

As a model of adjudication, formalism posited a strict distinction between legislating – the act of making law by the political branches – and judging – the act of rigidly applying law to resolve concrete disputes. For the formalist, the judge did not make law, but rather applied it in mechanical fashion. In Rufus Wheeler Peckham's notorious majority opinion in *Lochner v. New York* (1905), the Supreme Court struck down a New York state maximum-hours law designed to protect the health of bakers. Peckham's

4 See William Twining, *Karl Llewellyn and the Realist Movement*, London 1973.

conclusion, that the law violated the right to contract, embraced a categorical conception of rights and a highly formal view of the right to contract, one that refused to consider any real-world disparity in the bargaining power of employers and employees. *Lochner* came, then, to epitomize a type of jurisprudence in which judges ruthlessly applied formal rules that ignored the stresses and inequalities of the real world.

*The Bramble Bush* simply dismissed the notion that law could be understood or studied as a system of rules. ›Rules *alone*‹, Llewellyn told his students, ›are worthless.‹ (p. 4) Law, he argued, never functions as a wholly deductive or mechanical process. Legal disputes are ultimately resolved by judges, and anticipating Justice Brennan's words to his freshly-minted clerks, Llewellyn famously insisted: ›What these officials do about disputes is, to my mind, the law itself.‹ (p. 5) Llewellyn never, however, consigned rules to irrelevance or sought to reduce law to the arbitrary behavioral tics of an unelected elite. He recognized that the act of judging demands that rules be consulted, and while formal rules may not *dictate* the outcome of cases, they ›are important to you so far as they help you see or predict what judges will do‹ (p. 7).

At the time, all this must have sounded quite fresh and even radical. Llewellyn took his title from the nursery rhyme about a man who scratches his eyes out by jumping into a bramble bush, then scratches them *in* again by jumping into another bramble bush.<sup>5</sup> Llewellyn's lectures figuratively sought to do just that. They aimed to scratch out the eyes of students who arrived at Columbia expecting to see the law only as formal rules. But their goal was not to leave students stumbling in blindness. They sought to provide a fresh, unoccluded picture of the law as it actually is.

Do these ideas still have the power to excite? Writing in 1951 on the occasion of the republication of *The Bramble Bush*, Grant Gilmore, one of the most prominent law professors of his day and best known for his incisive critique of contract law, answered decidedly in the negative. ›These are ideas which have served their time‹, Gilmore wrote, ›and passed out of controversy. They may now take their place alongside the theory that the earth is round and Harvey's quackery about the circulation of the blood.‹<sup>6</sup> True, Gilmore was perhaps premature in treating Llewellyn's once-novel insights as unassailable orthodoxy. Recall that barely a decade after Gilmore penned his words, the British legal philosopher H.L.A. Hart brilliantly noted that the realists' concern with predicting judicial outcomes delivers an incoherent model of judging, as it suggests that in deciding a case, a judge seeks to predict how he or she will decide the case.<sup>7</sup>

Nonetheless, Gilmore was surely correct that the problem with *The Bramble Bush* today is not that its insights have been overturned but that they have been either largely reduced to truism or eclipsed by more sweeping projects of critical jurisprudence.

5 In full, the nursery rhyme goes: ›There was a man in our town, | And he was wondrous wise, | He jumped into a bramble bush, | And scratched out both his eyes; | But when he saw he was blind, | With all his might and main, | He jumped into another bush, | And scratched them in again.‹

6 Grant Gilmore, Book Review: *The Bramble Bush*, in: *Yale Law Journal* 60 (1951), pp. 1251-1252, here p. 1252.

7 H.L.A. Hart, *The Concept of Law*, New York 1961, p. 136.

Indeed, *The Bramble Bush* cannot even be properly described as a work of jurisprudence, for while it certainly makes jurisprudential claims, it can be best understood as a guide to successful appellate advocacy. Students who absorbed its lessons would become better attorneys. In its time, the book may have challenged the prevailing assumptions that informed legal training, but it launched no larger assault on law's majestic edifice.

Critical Legal Studies (CLS), powerfully in vogue when I was in law school, entertained far grander ambitions. During my first year at Yale, 1987, Harvard's Roberto Unger, a principal expositor of CLS, came to deliver a series of lectures on the movement. I remember them vividly. Unger spoke without notes and with a chilly, priestly detachment. If Llewellyn addressed his students directly and accessibly, Unger made no such concessions to his audience. He stood before us in profile, as if addressing an unseen offstage interlocutor. I had read Unger in college, had begun work on a PhD in political theory, and so was better prepared than most in the crowded auditorium to make sense of his austere theory. All the same, I could barely understand anything that came out of the professor's mouth; he was speaking a different language, incomprehensible to mere mortals. And yet we still thrilled to his words. They seemed to suggest that law was all smoke and mirrors; that an irreducible indeterminism lay at the heart of all legal decisions; that legal discourse served only to obfuscate and rationalize existing power relations; and that once law's illusory categories had been unmasked, the political values that legal discourse suppressed would become available for frank discussion and progressive action.<sup>8</sup>

Against the radical claims of CLS, Llewellyn's advice to would-be lawyers sounds modest, even humdrum. And yet one comes away from *The Bramble Bush* with the realization that much of what the Critics said had already been said by Llewellyn, and with far greater clarity. If anything, by importing the forbidding jargon of Hegelian dialects and French poststructuralism to demonstrate what Llewellyn had argued decades earlier – that, for example, 'every single precedent [...] is ambiguous' (p. 75) – CLS ironically spoke in a discourse far more opaque than the one it claimed to unmask. Lost was the pleasing directness of Llewellyn's interventions.

Which brings me to a final observation. It is certainly true that no one in the legal academy today thinks of law as a formal system of rules that apply with deductive force. That view, as Gilmore noted, has been utterly demolished. All the same, can we confidently say that law students have any more sophisticated a picture of law than they did when Llewellyn boldly aimed to scratch their eyes out? The answer, I fear, is no. The reason, alas, is that the advent of legal realism and CLS failed to introduce any meaningful changes to the curriculum of American law schools.

My alma mater prides itself on offering the most theoretically-inflected legal education in the English-speaking world – in a course on 'The Rules of Evidence', I recall being assigned J.L. Austin's *How to Do Things with Words* and Wittgenstein's *Philosophical Investigations*. And yet even Yale requires no course in jurisprudence or legal

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8 These lectures were published as Roberto Unger, *The Critical Legal Studies Movement*, Cambridge 1986.

theory. While students cannot pass through the school without learning something about specific performance as a remedy to contract violation, they can merrily graduate without encountering the thought of Hart, Fuller, or Dworkin. That is, they can attend law school without ever being asked to consider what the law is.

In part, this is unsurprising: law school offers professional training, not a course of liberal arts study. Yet what is dispiriting is the foundational disconnect that lies at the heart of this training. While most legal scholars presumably have a jurisprudential vision, the courses they teach serve largely to bracket, rather than raise, jurisprudential questions. Most law school courses, for example, use casebooks as their instructional material, and most casebooks offer a highly redacted picture of a case, one that filters out precisely what Llewellyn sought to alert us to – the post hoc construction of facts, the gaps in juridical reasoning, the conflicting pulls of precedent. Though law professors know better, their pedagogy has an *as if* quality: they continue to teach the law *as if* doctrine were coherent, *as if* it evolved in a principled fashion, and *as if* it could be grasped without any attention to larger historical forces or the specific personalities of those who forged it.

In this respect, *The Bramble Bush* unexpectedly remains, ninety years on, an urgent text. For it demands that law students critically reflect on what the law is. Its answers may be deeply familiar to those who have thought about the law; yet, shockingly, most law students are never asked to engage in this simple and essential exercise.

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